

*Péter Varga*

## **“Racial or Ethnic Origin” vs. “Membership of a National Minority” in EU Law**

With the 2004 and subsequent enlargements of the European Union numerous national minorities have become EU Citizens which called for a redefinition of the role of the EU towards minorities. Ten years after the largest single enlargement there are still non-exploited opportunities in EU Law in this regard. Article 19 of the Treaty on Functioning of the European Union (TFEU) provides for a prohibition of discrimination based on racial or ethnic origin.<sup>1</sup> It does not contain a direct prohibition of discrimination and it is not directly effective, but it enables the EU to adopt measures to combat discrimination on the listed grounds within the scope of the policies and powers otherwise granted by the Treaties.<sup>2</sup> The mentioned Article (and its precedent) served as a basis for directives, action programmes and a number of “European years.”<sup>3</sup> However, it was not used for adoption of a specific, minority oriented directive, partly due to the fact that it still remains ambiguous whether “race and ethnic origin” in Article 19 TFEU gives competences to the EU-legislator to adopt legal acts governing the rights and situation of national minorities/ persons belonging to national minorities.

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<sup>1</sup> Article 19 (ex Article 13 TEC) 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

<sup>2</sup> Paul Craig – Gráinne de Búrca: *Eu Law Text, Cases and Materials*. Fifth Edition, Oxford University Press, 2011. p.868

<sup>3</sup> Gabriel N. Toggenburg: *A remaining Share of a New Part? The Union’s Role vis-à-vis Minorities after the Enlargement Decade*. EUI Working Papers Law No. 2006/15, pp.6-7.; Since 1983 the EU dedicates a year to a specific subject to encourage debate and dialogue within and between European countries. The aim is to raise awareness of certain topics, encourage debate and change attitudes. For example: European Year of Equal Opportunities for All (2007), European Year of People with Disabilities (2003).

### EU Law – as it is

National minority protection has been for a long time reduced to the external sphere of the European Union, only the adoption of Article 13 of the Amsterdam Treaty (Article 19 under Lisbon Treaty) provided for the “internalisation” of national minorities.<sup>4</sup> The EU’s attitude towards national minorities is wittily described with the language of economic integration as “primarily an export product and not one for domestic consumption.”<sup>5</sup> Others argue that minority protection is no longer merely a condition for becoming a member state but ever more as an expression of being an EU member state.<sup>6</sup> This argument was formulated before the adoption of the Lisbon Treaty which expressly enumerates the rights of persons belonging to minorities among the founding values of the European Union.<sup>7</sup> However, Article 2 of the Treaty on European Union (TEU) itself does not confer competence on the EU to adopt binding legal acts. Nonetheless, it may be invoked in case of clear risk of a serious breach by a Member State of the values in a political than legal procedure under Article 7 TEU.

New perspectives arose for national minorities with the anti-discrimination clause of Article 19 TFEU, which are still to be exploited. Learning from the unwillingness on the part of the European Union to tackle their specific problems, national minorities have chosen to adopt a bottom-up approach made possible by the European citizens’ initiative.<sup>8</sup> The Federal Union of European Nationalities (FUEN) launched the procedure for a citizens’ initiative entitled ‘Minority SafePack – one million signatures for diversity in Europe’<sup>9</sup>,

<sup>4</sup> Toggenburg: *A remaining Share of a New Part?* op. cit. pp.2-3.

<sup>5</sup> Bruno de Witte: *Politics versus Law in the EU’s Approach to Ethnic Minorities*. EUI working Papers, European University Institute No. 2000/4, p.3.

<sup>6</sup> Toggenburg: *A remaining Share of a New Part?* op. cit. p.4

<sup>7</sup> Article 2 of the Treaty on European Union: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

<sup>8</sup> Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative (OJ 2011 L65, p.1).; According to Art. 2 of the Regulation ‘citizens’ initiative’ means an initiative submitted to the Commission in accordance with this Regulation, inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties, which has received the support of at least one million eligible signatories coming from at least one quarter of all Member States; (OJ L 65, 11.3.2011, p. 1)

<sup>9</sup> **Subject-matter:**

We call upon the EU to improve the protection of persons belonging to national and

Balázs Izsák and Attila Dabis launched a citizens’ initiative entitled ‘Cohesion policy for the equality of the regions and the preservation of regional cultures’<sup>10</sup>, both relying – amongst others – on Article 19 TFEU. The European Commission refused to register either of the initiatives on the basis that they would fall manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.<sup>11</sup> The organizers challenged the decision of the Commission before the General Court of the EU, therefore currently there are at least two pending cases before the General Court in which it could define more closely the concept of ethnic origin and clarify whether Art 19 TFEU enables the EU to adopt measures to combat discrimination on the grounds of belonging to a national minority.<sup>12</sup>

Member States, EU institutions, NGOs and other organisations express diverging views on the question. Due to the fact that in practice it is non-EU nationals who are the main victims of ethnic discrimination, scholarly articles mainly deal with the question whether

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linguistic minorities and strengthen cultural and linguistic diversity in the Union.

**Main objectives:**

We call upon the EU to adopt a set of legal acts to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union. It shall include policy actions in the areas of regional and minority languages, education and culture, regional policy, participation, equality, audiovisual and other media content, and also regional (state) support. Available at: <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1507>. The complete text of the Minority SafePack Initiative is available at: [https://www.fuen.org/fileadmin/user\\_upload/downloads/MSPI\\_ENGL\\_Official\\_Document.pdf](https://www.fuen.org/fileadmin/user_upload/downloads/MSPI_ENGL_Official_Document.pdf)

<sup>10</sup> **Subject-matter:**

The cohesion policy of the EU should pay special attention to regions with national, ethnic, cultural, religious or linguistic characteristics that are different from those of the surrounding regions.

**Main objectives:**

For such regions, including geographic areas with no administrative competencies, the prevention of economical backlog, the sustainment of development and the preservation of the conditions for economic, social and territorial cohesion should be done in a way that ensures their characteristics remain unchanged. For this, such regions must have equal opportunity to access various EU-funds and the preservation of their characteristics and their proper economical development must be guaranteed, so that the EU’s development can be sustained and its cultural diversity maintained. Available at: <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1488>; for a detailed presentation and analysis see: Gordos Árpád: Perben, haragban – Luxemburgban; *Pro Minoritate* 2014 Ósz, Budapest; pp.133-147.

<sup>11</sup> See Commission Decision C(2013)5969 final of 13 September 2013 and Commission Decision C(2013) 4975 of 25 July 2013

<sup>12</sup> See cases T-646/13 and T-529/13 respectively

Article 19 TFEU allows for adopting legislation referring to non-EU citizens.<sup>13</sup> The issue concerning the question how the broad range of prohibited grounds could be used in cases of overlapping concepts such as race, ethnicity and national minority remains unanswered.

The European Union Agency for Fundamental Rights (FRA) issued a report<sup>14</sup> on national minorities addressing matters closely related to the principle of non-discrimination of the Charter of Fundamental Rights of the European Union (Article 21<sup>15</sup>). The report acknowledges that the horizontal obligation under Article 19 TFEU goes further than Article 21 of the Charter, which merely prohibits the Union from discriminating on various grounds.<sup>16</sup> Compared to Article 19 TFEU the Charter contains a broader range of protected grounds, expressly enumerating “membership of national minority”, “language” and “colour” in addition to race, ethnic origin and religion (which are contained in both Article 19 TFEU and Article 21 of the Charter). This approach led to a conclusion on the part of the FRA and prominent scholars that the new horizontal obligation of the EU builds on the enabling provision in Art 19 TFEU and does not cover discrimination on grounds of membership of national minority or language.<sup>17</sup> Others argue<sup>18</sup> that the “reference to “ethnic origin” must be seen as complementary to “racial origin”: what is meant are persons targeted for discrimination on account of their cultural characteristics, whether or not they belong to a different race”<sup>19</sup> and further explaining that the intended measures would clearly target immigrant communities, but “there do not seem to be good reasons why the Roma, or indeed the traditional territorially-based ethnic minorities, could not also invoke their protection.”<sup>20</sup> In line

<sup>13</sup> Toggenburg: *A remaining Share of a New Part?* op. cit p.21.

<sup>14</sup> Respect for and protection of persons belonging to minorities 2001-2010. The European Union Agency for Fundamental Rights, Publications Office of the European Union, 2011

<sup>15</sup> Article 21 Non-discrimination: 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

<sup>16</sup> Respect for and protection of persons... p.23.

<sup>17</sup> Ibid p.23. and Toggenburg: *A remaining Share of a New Part?* op. cit p.8.

<sup>18</sup> Although those opinions were formulated in the pre-Charter era, I doubt that the text of the Charter changed this position.

<sup>19</sup> de Witte: *Politics versus Law in the EU's Approach to Ethnic Minorities*. op. cit. p.19.

<sup>20</sup> Ibid. p.19.

with this argumentation the EU sets socio-economic integration of marginalised communities such as the Roma as special investment priority in its cohesion policy<sup>21</sup> evaluated as a key development in the FRA report.<sup>22</sup> The latter underlines also the fact that this is the first time that one specific investment priority focusing on the inclusion of Roma and other marginalised communities is included as a requirement in the Structural Funds.<sup>23</sup>

It can be disputed that because of a clear distinction in wording of Article 19 TFEU and Article 21 of the Charter, racial or ethnic origin does not cover national minorities. It would be extremely strange from the human rights point of view if the result of the codification process, which resulted in national minorities being finally expressly mentioned in the primary law of the Union, could also serve as a decisive argument for excluding them from the scope of Article 19 TFEU. It would be also in contradiction to the level of protection article of the Charter which states that “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised...”.<sup>24</sup> The argument that Article 19 cannot serve as a legal basis for adopting an instrument addressing the situation of special minority communities is more a political than a legal one.<sup>25</sup> As Vizi points out, the lack of a specific directive prohibiting discrimination of ethnic minorities in the EU law is more likely due to the divergent views of the member states concerning the forms of discrimination.<sup>26</sup>

The European Union Network of Experts in Fundamental Rights has recommended the adoption of a “Directive specifically aimed at encouraging the integration of Roma” and was of the opinion that Article 13 ECT (now Article 19 TFEU) forms the appropriate legal

<sup>21</sup> REGULATION (EU) No 1304/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006

<sup>22</sup> Fundamental rights: challenges and achievements in 2013, European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the EU, 2014

<sup>23</sup> *Ibid.* p.169.

<sup>24</sup> Article 53 of the Charter

<sup>25</sup> See Olivier De Schutter-Annalies Verstichel: *The Role of the Union in Integrating the Roma: Present and Possible Future*. European Diversity and Autonomy Papers EDAP 2/2005, p.33., at [www.eurac.edu/edap](http://www.eurac.edu/edap); Christoph Hillion: Az Európai Unió bővítése – a tagsági kötelezettségek és a csatlakozási követelmények ütközése a kisebbségvédelem terén. *Pro Minoritate*, 2003/Tél, p.7.

<sup>26</sup> Vizi Balázs: *Európai kaleidoszkóp. Az Európai Unió és a kisebbségeik*. L'Harmattan Kiadó, Budapest, 2013. p.39

basis for such a directive.<sup>27</sup> The European Parliament also shared this position when urged the Commission to continue to implement a coherent general strategy on the problems facing minorities in the Union, by continuing to enforce existing anti-discrimination legislation and considering possible further action based on Article 13 on anti-discrimination policy. The Parliament was of the opinion that 'using this legal basis, which is the most far reaching as regards the protection of minorities, the Union could, on the basis of its experience, develop the following initiatives that have already been implemented and strengthen various articles of the FCNM [Framework Convention for the Protection of National Minorities – op. ed.], such as Article 3(1), Article 4(2) and (3) and Articles 6 and 8 thereof'.<sup>28</sup> In addition, the Council of the European Union has specifically based its Recommendation on effective Roma integration measures in the Member States on the contested Article 19 (1) TFEU.<sup>29</sup>

When comparing Article 19 TFEU and Article 21 of the Charter it should be noted that the latter indeed adds new grounds of prohibited discrimination: colour, social origin, genetic features, language, political or any other opinion, membership of national minority, property and birth. Article 21 imports a general prohibition of discrimination with an open-ended wording and therefore it should be necessary to look more closely which grounds are new ones comparing to Article 19 TFEU and which are merely elaborating the ones already included in the enabling article. The international law practice strongly supports the view that discrimination based on colour and belonging to a national minority are already included in the prohibited ground of racial or ethnic origin as elaborated in the next section.

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<sup>27</sup> <http://www.errc.org/article/eu-experts-recommend-directive-on-roma-integration-european-union-network-of-experts-in-fundamental-rights-calls-for-roma-integration-directive/1921>; The Synthesis Report: conclusions and recommendations on the situation of fundamental rights in the European Union and its Member States in 2003 states: „However, considering the specificity of the situation of the Roma, whose socio-economic condition requires not only protection from discrimination but also affirmative desegregation in employment, housing, and education, the EU Network of Independent Experts on Fundamental Rights invites the European Commission to consider proposing a directive based on Article 13 EC and specifically aimed at improving the situation of the Roma population.”

<sup>28</sup> European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), para 49.

<sup>29</sup> COUNCIL RECOMMENDATION of 9 December 2013 on effective Roma integration measures in the Member States (2013/C 378/01)

## **The Convention for the Protection of Human Rights and Fundamental Freedoms – a tool for interpretation of EU Law?**

When interpreting Article 19 TFEU due regard has to be given to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR). Article 6 (2) TEU stipulates that the Union shall accede to the ECHR. Subparagraph (3) adds that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law. This reflects the settled case law of the Court of Justice of the European Union (CJEU) „according to which fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.”<sup>30</sup>

The CJEU has found more than forty years ago that international treaties for the protection of human rights (i. e. ECHR), of which the member states are signatories, can supply guidelines which should be followed within the framework of community law. „That conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case law of the Court, refers on the one hand to the rights guaranteed by the constitutions of the Member States and on the other hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Official Journal C 103, 1977, p. 1).”<sup>31</sup>

Another strong argument for finding that the ECHR and the related case law should be used when interpreting Article 19 TFEU is provided by the Charter of Fundamental Rights of the European Union, which is now part of the primary law.<sup>32</sup> Article 52 (3) of the Charter stipulates that in so far as the Charter contains rights which correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Article 6 (1) TEU provides that the rights, freedoms and principles in the Charter shall be interpreted with due regard to the explanations referred to in the Charter that sets out the sources of those provi-

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<sup>30</sup> Case C-571/10 *Servet Kamberaj v Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, para 61.

<sup>31</sup> Judgment of the Court of 13 December 1979. *Liselotte Hauer v Land Rheinland-Pfalz*. Reference for a preliminary ruling: *Verwaltungsgericht Neustadt an der Weinstraße - Germany*. Prohibition on new planting of vines. Case 44/79. European Court Reports 1979 -03727, para 15.

<sup>32</sup> Article 6 (1) TEU

sions. Explanations relating to the Charter of Fundamental Rights further clarifies that in so far as the rights in the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the ECHR.<sup>33</sup> Furthermore, the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the ECHR and by the CJEU.<sup>34</sup> The Explanations contain two lists, one of which consists of Charter provisions entirely within the scope of Article 52 (3), the other sets out those provisions where the meaning is the same as the corresponding Articles of the ECHR. Neither of them mentions Article 21 of the Charter. A leading Commentary to the Charter points out that there are two cases where, despite the fact that the particular Charter right cannot be found on the mentioned list, the Explanations to a particular Charter right refer to the ECHR. One is Article 21 on equality, which “‘applies in compliance’ with Article 14 to the extent of the correspondence with that ECHR rule.”<sup>35</sup> Article 21 of the Charter lists „racial or ethnic origin” and „membership of national minority”, whereas Art. 14 ECHR<sup>36</sup> ‘only’ “race” and „association with a national minority”, however, race and ethnic origin should be regarded as overlapping grounds,<sup>37</sup> the correspondence therefore exists in this regard.

Article 6 (1) TEU, Article 52 (3) Charter and the Explanations thereof read together „incorporate” (although not formally) the text of ECHR and case law of the ECtHR into the primary law of the EU, where the concept of race and ethnic origin should be interpreted in the same way, irrespective of the circumstance which segment (TEU, TFEU or the Charter) is applied. Thus, the Charter is not creating new competences to the EU,<sup>38</sup> but it is relevant in interpreting the treaties,<sup>39</sup> for example in determining the exact scope of competences under Article 19 TFEU. Explanations underline that Article 21 (1) does not alter either the extent of powers granted under Article 19 or

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<sup>33</sup> Official Journal of the European Union (2007/C 303/02)

<sup>34</sup> Explanations on Article 52

<sup>35</sup> Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds.): *The EU Charter of Fundamental Rights - A Commentary*. Oxford: Hart Publishing, 2014. p.1493 ; see also Explanation on Article 21

<sup>36</sup> Article 14 Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>37</sup> Argumentation for this see later.

<sup>38</sup> Pursuant to Article 6 (1) TEU and Article 51 (2) of the Charter

<sup>39</sup> See also Peers et al. (eds.): *The EU Charter of Fundamental Rights - A Commentary* op.cit. p.1431

the interpretation given to that Article. However, following the line of argumentation in this paragraph of the Explanations, this should be understood as a limiting interpretation related to measures to combat certain forms of discrimination.<sup>40</sup>

Differences regarding the protected grounds of discrimination exist between legal instruments, such as the Charter (primary law of the EU), the Race Directive<sup>41</sup> (secondary law) or international human rights conventions (i.e. ECHR). However, there can be no differences regarding the *ratione personae* of a specific protected ground. “Racial or ethnic origin” as a category protected by the primary and secondary law of the EU as well as international human right instruments should have the same personal scope, irrespective of the type of the legal instrument where it appears. It shall be interpreted by the EU institutions in a uniform way and in conformity with international practice. The ECHR is not just the first comprehensive treaty in the world in the field of human rights; it is also the most judicially developed of all the human rights systems.<sup>42</sup>

Article 14<sup>43</sup> of ECHR on the prohibition of discrimination and Article 1 of its Protocol No. 12 on general prohibition of discrimination do not list “ethnicity” as a protected ground, only race, colour, language, religion, national origin, and association with a national minority. However, when it is relevant in the given case, the ECtHR consequently uses the term “ethnic” (and its variations) and analyses the ethnic origin of persons concerned, due to the fact that, according to its well-established case law, race, ethnic origin and national minority are overlapping concepts with no clear limitations. In *Timishev v. Russia* the ECtHR found that *‘ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of soci-*

<sup>40</sup> Scholars for example express different views regarding the possibility of affirmative action based on Art 19 (ex Art 13). See for example de contrasting views of De Schutter-Verstichel and Toggenburg. However, this is an issue worth another in-depth analysis on the ruling of the ECJ.

<sup>41</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; *Official Journal L 180, 19/07/2000 P. 0022 – 0026*

<sup>42</sup> Philip Alston – Ryan Goodman: *International Human Rights*. Oxford University Press, 2013, p. 891.

<sup>43</sup> Article 14 ECHR guarantees an accessory right applicable only in relation to the enjoyment of the rights and freedoms otherwise protected by the Convention. However, this does not affect the interpretation of the personal scope of the protected grounds.

*etal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.*<sup>44</sup> It should be borne in mind that there is still no legally binding definition of national minority in international law,<sup>45</sup> however, the attributes of national minorities are the same as for “ethnicity” in the cited case.<sup>46</sup>

The ECtHR adopted the same approach in *Sejdić and Finci c. Bosnia and Herzegovina*, where it examined the fundamental rights of two persons, one of Roma and the other of Jewish ethnic origin, both having national minority status in their state. The court found that “[d]iscrimination on account of a person’s ethnic origin is a form of racial discrimination.”<sup>47</sup>

In *D. H. and others c. the Czech Republic*<sup>48</sup> landmark case on Article 14 ECHR, the court examined discrimination in education of persons belonging to national minorities under domestic legislation<sup>49</sup> from a racial and ethnic origin point of view, despite the fact that Article 14 lists discrimination on ground of association with national minority as well.<sup>50</sup> The court gave due consideration in its analysis also to Article 13 ECT, the Racial Directive and the case law of CJEU.

It should be also noted that the European Commission against Racism and Intolerance (ECRI), a human rights body of the Council of Europe, defines racism as “the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons or the notion of superiority of a person or a group of persons.”<sup>51</sup> In accordance with this definition ECRI consistently examines the situation of national minorities in the Member States.<sup>52</sup>

<sup>44</sup> *Timishev v. Russia*. 13 December 2005. Application Nos. 55762/00 and 55974/00. at 13., 55.

<sup>45</sup> Even the Framework Convention for the Protection of National Minorities (FCNM) of the Council of Europe does not define the term „national minority”.

<sup>46</sup> See Article 6 of FCNM and the definition in legally non-binding Recommendation 1201. (1993) of the Parliamentary Assembly of CoE.

<sup>47</sup> *Sejdić and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06), 22 December 2009, Para 43.; see also: *Handbook on European non-discrimination law of the European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe*, Luxembourg: Publications Office of the European Union, 2011, p. 104-106.

<sup>48</sup> *D.H. and Others v. the Czech Republic* (No. 57325/00), 16 March 2006

<sup>49</sup> Para 14.

<sup>50</sup> Paras 3., 124., 139., 176.

<sup>51</sup> General Policy Recommendation No. 7, Definitions 1. a)

<sup>52</sup> See for example: ECRI Report on Romania (fourth monitoring cycle) at <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Romania/ROM-CbC-IV-2014-019-ENG.pdf>;

Following the same line of argumentation it is evident that the circumstance that the Charter does and Article 19 TFEU does not expressly mention national minorities cannot result in a conclusion that there is a clear difference in the primary law of the EU between discrimination based on racial or ethnic origin and discrimination based on membership of a national minority. The express reference to national minorities in the Charter “merely” underlines, makes it unequivocal that the Charter prohibits discrimination on this ground as well. This view is supported also in the recital (6) of the Race Directive, which strongly suggests that the category of race is contested and scientifically unfounded; consequently, the EU legislation avoids attempting to define the notion of discrimination on grounds of racial or ethnic origin.<sup>53</sup>

### Conclusions

The requirement of coherence implies that the EU should build on the *acquis* of international and European human rights law when interpreting its legislative powers. Discrimination based on “racial and ethnic origin” as enshrined in Article 19 TFEU covers discrimination based on belonging to a national minority as well. Clash of views might (and certainly would) arise regarding the constitutive elements of national minority; however, this should not be a legal obstacle when adopting EU legislation concerning national minorities. Noting that the Union have competences to adopt legislation concerning the Roma minority (whether or not the text of the treaties uses the term minority) and that “ethnicity” covers nationality, religion, language or cultural and traditional origins, the General Court could – without too much judicial activism – find that the EU indeed has competences to adopt legal acts – amongst others – concerning national minorities.

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ECRI Report on Hungary (fourth monitoring cycle) at <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf>;  
 ECRI Report on Slovakia (fourth monitoring cycle) at [http://hudoc.ecri.coe.int/XML/ECRI/ENGLISH/Cycle\\_04/04\\_CbC\\_eng/SVK-CbC-IV-2009-020-ENG.pdf](http://hudoc.ecri.coe.int/XML/ECRI/ENGLISH/Cycle_04/04_CbC_eng/SVK-CbC-IV-2009-020-ENG.pdf)

<sup>53</sup> Craig-de Burca: *Eu Law Text, Cases and Materials* op. cit. p.869